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In the Supreme Court of the United States

OCTOBER TERM, 1988

CARL CRONK, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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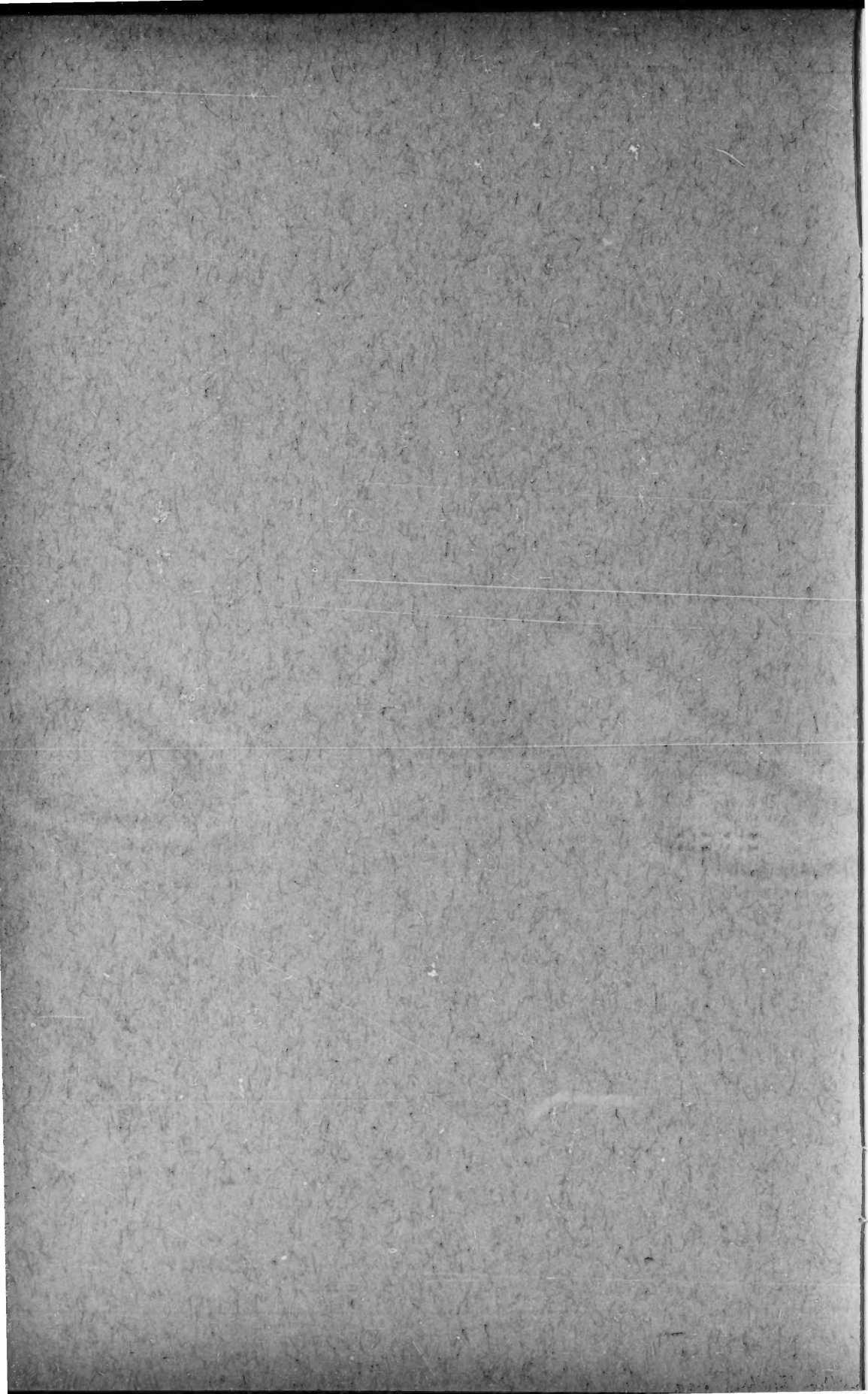


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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his action against the United States for breach of contract was commenced within the statute of limitations.

1. Petitioner was an employee of the United States Postal Service (Pet. App. 20). In January 1979, petitioner sought a transfer from his position in Portland, Maine, to the Postal Service office in San Antonio, Texas (*ibid.*). When the transfer was denied, petitioner filed administrative charges of illegal discrimination against the Postal Service (*ibid.*). On January 28, 1980, petitioner and the Postal Service reached a settlement agreement. Petitioner agreed to withdraw his claim of discrimination and the Postal Service agreed to employ him in San Antonio if he was found to be physically qualified (*id.* at 20-21).

On November 19, 1982, the United States Claims Court received from petitioner a proposed complaint against the "Postal Service" (Pet. App. 10).¹ The clerk of the court

¹ Two weeks earlier, the same complaint had been delivered to the Court of Appeals for the Federal Circuit by mistake.

telephoned petitioner's counsel to inform him that the proposed filing did not satisfy the court's rules, but the clerk was told that counsel was "not in" (*id.* at 11). The clerk left a message; petitioner's counsel, however, did not return the call. Thus, several days later, the clerk returned the complaint, which was not filed, to petitioner's counsel (*id.* at 25-26).

On July 5, 1983, the clerk of the Claims Court received another proposed complaint from petitioner that named the "United States Postal Service" as the defendant (Pet. App. 26). That proposed complaint was defective—the United States, not the Postal Service, is the proper defendant in the Claims Court (see 28 U.S.C. 1491), and the complaint was not accompanied by the filing fee. The clerk telephoned petitioner's counsel who was not available and who did not return the call (Pet. App. 26). On July 8, 1983, the clerk returned this proposed complaint to petitioner's lawyer without filing it. Petitioner took no further action for almost four years (*id.* at 27).

On February 5, 1987, petitioner filed in the Claims Court "Plaintiff's Original Complaint," in which he asserts an action against the United States for breach of the 1980 settlement agreement (Pet. App. 27). Specifically, petitioner alleges in his complaint that he withdrew his discrimination charges, but by April 1980 the Postal Service "refused to abide by * * * the agreement" (Complaint ¶ 7). The government moved to dismiss the action as barred by the applicable six-year statute of limitations (28 U.S.C. 2501). The Claims Court granted the government's motion. The court held that petitioner's cause of action accrued in 1980; thus, petitioner's 1987 complaint was filed outside the limitations period (Pet. App. 31-33). The court rejected petitioner's contention that his complaint should be deemed filed as of November 1982, when he submitted a

defective complaint that was returned by the clerk. Commenting on counsel's actions, the court stated: "To wait four years, knowing that the [complaint] had not been filed is inexcusable and flies in the face of the very reason for the six-year statute of limitations" (*id.* at 28). The Federal Circuit affirmed the Claims Court's judgment on the basis of the lower court's opinion (*id.* at 1-2).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

a. Petitioner alleges in his complaint that, as of April 17, 1980, the Postal Service "refused to abide by the January 1980 [agreement]" (Pet. App. 30-31).² Petitioner's breach-of-contract claim thus accrued in April 1980. See *LaMear v. United States*, 9 Cl. Ct. 562, *aff'd*, 809 F.2d 789 (Fed. Cir. 1986). Accordingly, petitioner's action is barred by the six-year statute of limitations for actions in the Claims Court if the action was not commenced by April 1986.

A case is commenced when the plaintiff files a complaint. See Cl. Ct. R. 3(a) and (b)(1); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980). Here, petitioner's complaint was filed in 1987, outside of the limitations period. To avoid that result, petitioner argues (Pet. 8-18) that his complaint should be deemed to have been filed in 1982 when the defective complaint against the Postal Service was mailed to the Claims Court. Petitioner's argument is without merit.

Petitioner cites cases (Pet. 10-11) holding that a complaint may be deemed filed at the time it is submitted to a

² At that time, the Postal Service informed petitioner that he would not be assigned to any position in San Antonio (Pet. App. 30). Petitioner then filed for disability-retirement benefits (Pet. 5).

court clerk even though the clerk refuses to file the complaint until formal deficiencies (*e.g.*, size of paper) are corrected. Those cases, however, do not aid petitioner. In those cases, "the deviations generally are minor and the results reached are in accord with the spirit of the rules." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1052, at 168 (1987). See, *e.g.*, *Loya v. Desert Sands Unified School District*, 721 F.2d 279, 280 (9th Cir. 1983) (clerk did not file complaint when it was submitted because it was typed on 8½ by 13 inch paper instead of 8½ by 11 inch paper).

Here, the conduct of petitioner and his counsel support the court of appeals' conclusion that principles of fairness do not dictate that petitioner's complaint be deemed filed in 1982. First, the errors in the 1982 and 1983 complaints were not minor; those complaints named as a defendant a party (the Postal Service) that may not be sued by a private party in the Claims Court. Second, if the complaint were "filed" in 1982, it remained dormant for five years. Undoubtedly, during that five-year period, the defendant (whether the United States or the Postal Service) could have had the case dismissed without prejudice for failure to prosecute. See Cl. Ct. R. 41(b). In such a case, petitioner's 1987 complaint would have been untimely because the filing of a suit which is dismissed without prejudice does not toll the statute of limitations. See *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 28 (6th Cir. 1987); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982); *Dupree v. Jefferson*, 666 F.2d 606, 611 (D.C. Cir. 1981).

b. In any event, the Claims Court's judgment of dismissal is correct even if petitioner's complaint were deemed filed as of 1982. The United States was not named as a defendant in the 1982 complaint.³ The United States

³ The Postal Service, of course, is not the legal equivalent of the United States. Congress created the Postal Service in 1970 and em-

was first made a party in petitioner's 1987 pleading, which must be an "amended complaint" under petitioner's view of the case. The record shows (Pet. App. 10-12), however, that the clerk of the Claims Court never issued a summons in 1982; thus, petitioner did not serve the Postal Service nor the United States with process. Hence, the 1987 "amended complaint" does not relate back to the original pleading for purposes of the statute of limitations (see Fed. R. Civ. P. 15(c)). Accordingly, even under petitioner's theory, the action against the United States was commenced in 1987, after the limitations period had expired.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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powered it "to sue and be sued in its official name" (39 U.S.C. 401(1)). In *Loeffler v. Frank*, No. 86-1431, (June 13, 1988), this Court noted that Congress " 'launched [the Postal Service] into the commercial world' " (slip op. 6 (citation omitted)). The Court observed: "Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise' " (*ibid.* (citation omitted)).